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Review

Testamentary capacity: A practical guide to assessment of ability to make a valid will

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ABSTRACT

Medical practitioners are occasionally requested to provide opinions on people's ability to make a valid will. Moreover, if a will is challenged subsequent to the death of the testator, the evidence of a medical practitioner may be pivotal to a decision by the courts on the validity of the will. Litigation can be avoided if a well-founded expert opinion, based on thorough medical assessment, is available. The combination of an aging population, a consequent increase in the prevalence of dementia, an increase in *per capita* wealth, and more complex family structures with increasing rates of divorce and remarriage, is likely to result in a greatly increased frequency of demands on medical practitioners to provide opinion in this regard. In order for the result of a medical assessment of testamentary capacity to be legally valid, it is imperative that medical practitioners have adequate guidance on what is expected of them in their assessment. As there is no standardised tool for medical practitioners to which to refer, a synthesis of relevant literature is presented to guide medical practitioners in the assessment of testamentary capacity. Medical practitioners' roles in this medico-legal process are elaborated and elucidated.

1. Introduction

A will is a document that outlines how one or more individuals wishes their worldly possessions to be distributed after their death. The individual who makes the will is known as the testator (male) or testatrix (female). In most cases, a will is made with the aid of a solicitor. This is not a legal requirement, such that one can choose to compose a will without legal assistance. In either case, the will must be witnessed by at least two individuals. The testator must sign or mark the will in the presence of these two witnesses, both of whom must then sign the will, at the same time and in the presence of the testator. Where a testator is physically disabled so as to be unable to sign or mark the will, then they may nominate a representative to sign or mark the will on their behalf. Witnesses cannot be beneficiaries or be married to beneficiaries of the will. Whilst the witnesses must sign the will, it is not legally required that they see what is written in the will. The will should identify an executor, who has the responsibility of ensuring that the wishes of the deceased, as outlined in the will, are carried out. In addition to all of these legal requirements, the testator must also be "of sound mind". Testamentary capacity is the legal term used to describe the level of understanding that is required in order for an individual to be able to make a valid will. It is in the assessment of testamentary capacity that medical practitioners may be involved in contributing to the legal determination of the validity of a will. One may be asked to carry out such an assessment and provide an opinion contemporaneously with the making of the will, or alternatively one may be asked to provide an opinion after the death of the testator by review of medical notes and other available information. Testamentary capacity is ultimately determined by the courts; however, decisions are guided by medical opinion and, in reality, the majority of cases are decided outside of the court room. If a testator is found not to have testamentary capacity at the time a will was made, then that will is rendered legally invalid.

2. When is a medical assessment of testamentary capacity required?

2.1. The golden rule

In the English case of Kenward v Adams,[1] Mr Justice Templeman outlined the "golden rule" for legal practitioners in the formulation of wills for elderly and/or ill testators. He declared that:

> "in the case of an aged testator or a testator who has suffered serious illness, there is one golden rule which should always be observed, however straight-forward matters may appear, and however difficult or tactless it may be to suggest that

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precautions be taken, the making of a will by such a testator ought to be witnessed or approved by a medical practitioner who satisfied himself of the capacity and understanding of the testator, and records and preserves his examination and finding".

The legal practitioner is strongly advised to obtain expert medical opinion on testamentary capacity when the testator is of advanced age and/or is suffering from serious mental or physical illness. This "golden rule" continues to be endorsed by leading authorities on testamentary capacity.[2] In addition to this, the prudent legal practitioner is well advised to obtain expert medical opinion in cases where a legal challenge to the will is anticipated and/or where sudden or unusual changes are made to a will by the testator.

3. What constitutes testamentary capacity?

3.1. Banks v Goodfellow criteria

The most commonly cited criteria for testamentary capacity were established in the English case of Banks v Goodfellow.[3] In this case, Lord Chief Justice Cockburn outlined his understanding of a "sound disposing mind":

> "It is essential that a testator shall understand the nature of the act and its effect; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties: that no insane delusions shall influence his will in disposing of his property and bring about the disposal of it which, if his mind had been sound, would not have been made."

These essential elements of the judgement are paraphrased and summarised in Table 1. These criteria represent the standard reference in the assessment of testamentary capacity and are repeatedly invoked in the international literature on the subject. They form a reference base for most American and English commonwealth courts. It is recommended that the medical practitioner should use these criteria as a template upon which to assess testamentary capacity, but with due regard to the remainder of the guidance outlined in this review. It is interesting to note that these criteria for testamentary capacity are entirely based on case law. There is an international paucity of statutory legislation in the area of testamentary capacity. However, since the Mental Capacity Act 2005 came in to effect in England and Wales in 2007, an individual is said not to have capacity if he/she is unable to satisfy any of the following:

a) Able to understand the information relevant to the decision
b) Able to retain the information relevant to the decision
c) Able to use or weigh the information; or
d) Able to communicate the decision (by any means).

With respect to testamentary capacity, it remains to be seen if this statutory test of incapacity will supersede the case law on the subject. However the Code of Practice that accompanies the Act states at paragraph 4.33:

> "The Act's new definition of capacity is in line with the existing common law tests, and the law does not replace them……judges can adopt the new law if they think it is appropriate".

Table 1
The essential elements of the Banks v Goodfellow judgement paraphrased from Lord Chief Justice Cockburn.[3]

a) The testator/testatrix must be capable of understanding the nature of the act of making a will and its consequences. (i.e. the person understands what a will is, when it comes into effect, that it can be changed at a later date, the role of the executor, etc.)
b) The testator/testatrix must be capable of understanding the extent of his/her estate. (i.e. property jointly or solely owned by them, other assets, insurance policies, etc.)
c) Whilst the competent testator/testatrix will ultimately decide who the beneficiaries shall be, he/she must demonstrate understanding of the logical claims of those who might expect to benefit from his or her will. This applies to both those being included and those being excluded from the will.
d) The testator/testatrix must be capable of understanding the practical effect of the will. (i.e. who receives what, the impact of the will on the beneficiaries and on those who are excluded, the impact on any previous will, the impact of any changes from a previous will, the impact of any conditions attached to the will, that a beneficiary might pre-decease him/her, etc.)
e) The testator/testatrix must be free of any disorder of mind or delusions (i.e. mental illness) that shall influence his/her will and bring about a disposal of his/her property which, if his/her mind had been sound, would not have been made.

3.2. Situation and task specific nature of all mental capacities

Legal and medical practitioners involved in the assessment of testamentary capacity must understand this cardinal concept: mental capacity is both situation and task specific. With respect to task specificity, the absence of capacity to execute one task does not imply that the same individual does not have the capacity to successfully carry out a different task. The practitioner must be aware that whilst a testator may, as a result of mental or physical illness or advanced age, be incapable of successful execution of many activities of daily living, such as grocery shopping, dressing or driving, it is possible that they do have the capacity to produce a valid will. This is clearly established in English case law, such as the Banks v Goodfellow case, where a testator was known to suffer from a serious long-standing mental illness (schizophrenia), but was found by the court to be capable of determining the distribution of his estate because the illness was deemed not to have affected his ability to understand and plan the execution of this task.[3] In summary, the presence of serious illness does not equate to an automatic assumption of absence of testamentary capacity, but instead necessitates a thorough medical assessment.

That testamentary capacity is said to be situation-specific refers to the level of complexity of the testator's estate and/or the potentially convoluted network of people who might be expected to benefit from the will. Situation-specific factors must be taken into account by the courts in deciding testamentary capacity and by medical practitioners providing opinions on testamentary capacity. The threshold for testamentary capacity relates to the complexity of the situation. For example, in the straight-forward circumstances of a widowed man with an estate that includes only his own home and minimal savings, and who has one son who has been his main carer for many years, the threshold of mental capacity to make a valid will would be relatively low. In contrast, a person who owns several properties and businesses, was previously divorced and then remarried and has several children with both partners, with serious relationship difficulties between siblings, the threshold mental capacity required to negotiate this more complex situation and produce a valid will is deemed to be higher than in more straight-forward circumstances. In summary, practitioners must provide considered opinion as to whether the testator has task-specific capacity to execute a valid will within his unique set of situation-specific circumstances.

4. Assessing testamentary capacity

4.1. The basic principles

Before beginning, a medical practitioner should consider the request for assessment, looking especially at who has requested it and examining any reasons that they have outlined. The testators' medical and psychiatric notes and an outline of contents and value of the testator's estate should be available for review. Failure to obtain an accurate outline of the testator's estate from his solicitor is a common pitfall.[4] With respect to the medical notes, the practitioner should be aware that face-to-face assessment of the testator's level of function is paramount, and one should never rely solely on the results of investigations, such as radiological imaging of the brain, as the functional deficits seen in different patients with similar radiological findings are hugely variable.

As with all medico-legal situations, detailed contemporaneous notes should be carefully recorded, as they may, at a later date provide crucial guidance to the court. In the case of a legal challenge to a will, the court is likely to attach much greater weight to the evidence of the medical practitioner who carried out the assessment of the living testator contemporaneously with the production of the will, as opposed to the expert medical practitioner who provides post mortem evidence, based upon a retrospective review of the medical case. Although not yet in common practice, an English judge has suggested that medical assessments could be recorded on film as this may be of particular advantage in cases where a challenge to the will is expected.[5]

Thorough assessment of testamentary capacity necessitates a systematic approach. The assessment is best conducted in the absence of anyone who stands to benefit from the will or who might exert influence on the testator.[6] One should begin by explaining the purpose of the assessment and what it entails for the testator. The written informed consent of the testator should be documented. One should take a detailed medical and psychiatric history. A medication history should be obtained, along with details of recreational drug and alcohol use. Due diligence should be paid to the possibility of the testator's capacity being impaired by concurrent treatment with medication and/or withdrawal from previously used medications or drugs, with particular care provided in cases where the testator is receiving palliative care for terminal illness.[7] Where there is suspicion that medications are impacting upon capacity, knowledge of the half-life of the drug is useful. As a rule of thumb, very little of the drug remains in the body after five half lives have passed: $1/2 \times 1/2 \times 1/2 \times 1/2 \times 1/2 = 1/32$ of the initial blood concentration.[7] Medical practitioners should take care to ensure that the testator's capacity is not impaired by any other circumstances that can be easily rectified. For example, in the case of a person with dementia, performing the assessment in the security and comfort of the testator's own home rather than in a general practice surgery may allow the testator to achieve his full potential capacity by reducing anxiety and agitation. The medical practitioner should consider carrying out serial reviews of patients who may have fluctuating capacity. For example, those with delirium secondary to any cause or in patients who may be experiencing amnesia as a side effect of opiate analgesia or benzodiazepines.

A thorough mental state examination should be performed,[8] and documented under the usual headings (Table 2). The practitioner should then ensure that the Banks v Goodfellow criteria are satisfied.[3] From a legal perspective, the standard of proof for court decisions as to whether persons lack or have testamentary capacity is "on the balance of probabilities", as opposed to the standard of proof required in criminal cases which is "beyond reasonable doubt". With this in mind, guidelines on Capacity and Testamentary Capacity of the British Geriatric Society state that "the assessing doctor should therefore address the question: Is it more probable than not that this person lacks or has testamentary capacity?" [9] During the assessment, leading questions should be avoided and open questions should be employed in so far as possible. The reasoning behind the testator's decisions to include and exclude individuals should be sought out and documented, ideally in the testator's own words. When discussing a testator's plans for distribution of his assets, the practitioner should always remain open to the possibility that what may seem a strange and unexpected decision may still be fully valid.

Table 2
The mental state examination.

Appearance:	posture, dress, personal hygiene, grooming,nonverbal communication, manner, etc
Behaviour:	restlessness, threatening behaviour, degree of cooperation, etc
Mood:	subjective and objective description
Affect:	blunted, inappropriate, appropriate or depressed
Speech:	rate (pressured or slow), volume, tone, quantity, appropriate/inappropriate content, dysarthria, or dysphasia
Perception:	hallucinations (auditory, visual, olfactory, gustatory or tactile), depersonalisation or derealisation
Thought:	Stream: slow (psychomotor retardation) or fast (flight of ideas) Form: illogical, fragmented, logically connected or disjointed Content: overvalued ideas, delusions, suicidal and homicidal thoughts, preoccupations, obsessions or phobias
Insight:	patient's awareness and understanding of the condition and treatment
Cognition:	Mini Mental State Examination and other cognitive tests
Judgement:	response to hypothetical scenarios (e.g. what would you do if you found a sealed, stamped and addressed envelope on the street?)
Rapport:	demonstration of warmth, ability to partake in the doctor-patient relationship

The possible existence of previous wills should be discussed and the testator's understanding of the fact that any pre-existing will shall be superseded by the creation of a new will should be elucidated. The reasons given by the testator for producing a new will should be documented. In particular, the reasons for excluding previously included individuals should be recorded and the rationale behind this decision examined as these individuals are a likely source of future litigation.

In cases of uncertainty, the medical practitioner may wish to consider a repeat assessment on a separate date. If it is shown that the testator's wishes are consistently expressed on separate occasions, this may add to the strength of the medical practitioner's evidence. Where uncertainty remains, medical practitioners should refer to an expert colleague for further opinion.

4.2. Delusional beliefs, dementia and psychiatric illness

Delusional beliefs are a common reason why family members choose to challenge wills. A delusion is a fixed false belief that is held despite evidence to the contrary. When assessing a patient with dementia and/or psychiatric illness for testamentary capacity, the medical practitioner must look for the presence of delusions that influence the testator's decision on the distribution of his assets. Over emphasis of the significance of a delusional belief is a common pitfall in the assessment of testamentary capacity. In order for a delusion to affect testamentary capacity it must be demonstrated to directly impact upon the decision on the distribution of assets. For example, the will of an elderly lady with Alzheimer's dementia, who suffers from a delusional belief that she has been confined to a prison cell by her daughter, is likely to be found to be invalid if she removes her daughter from her will on the basis of this delusion. Conversely, the will may be held to be valid if it can be shown that the reason for removing her daughter from her

will was entirely different and uninfluenced by the delusion. All patients with new diagnoses of early dementia should be encouraged to engage with a solicitor as soon as possible so as to outline their future financial plans prior to the progression of their condition. A summary of the common medical causes of dementia is provided in Table 3 (adapted from Ref. 10). In the case of depressive illness, administration of a severity rating scale, such as the Hamilton Rating Scale for Depression,[11] may help guide opinion on capacity.

4.3. Alcohol

That the testator is or was an alcoholic does not automatically equate to impairment of testamentary capacity. The testator may well have testamentary capacity at the time of creating a will if he is not intoxicated at that time, but evidence of acute intoxication at that time would be likely to render the will invalid. In addition to acute intoxication, the medical practitioner should also assess for evidence of chronic alcohol related dementia, the Wernicke-Korsakoff syndrome, and/or hepatic encephalopathy, all of which may impair testamentary capacity.

4.4. Using cognitive screening tests and tests of executive function

Executive functions are high-level cognitive abilities that allow people to successfully respond to new situations by regulating the activities of other more basic functions such as memory, attention and motor skills. Executive functions, also referred to as frontal functions, are required for the implementation of goal-directed behaviour and for the construction and execution of a plan for the future. Making a will is a form of planning and thus testamentary capacity is dependent upon intact executive functioning. Normal aging is thought to result in a decline in executive function.[12] In all cases of known cognitive impairment and in cases where a deficit of executive function is suspected, it is prudent to consider administration of tests of executive function, such as the Montreal Cognitive Assessment (MOCA)[13] or the Wisconsin Card Sorting Test (WCST). The MOCA is available online, along with instructions for its use, at www.mocatest.org. Tests of verbal fluency and divided attention tests can also reveal problems with executive functioning. The very easily used clock-drawing test examines many different cognitive functions, including executive functions. The Mini-Mental State Examination (MMSE) is a screening tool for cognitive impairment that examines orientation, registration, attention and calculation, recall, language and visuospatial ability. However, the MMSE does not test executive functions. In terms of assessment of testamentary capacity, the MMSE plays a role in helping to identify patients with cognitive impairment, but a low score does not automatically imply impaired decision making capacity. Furthermore, the MMSE score must be interpreted carefully, by an experienced medical practitioner, in the context of the testator's prior educational achievement, social status and native language. With all of these standardized tests of cognitive function, medical practitioners should be careful to avoid the common pitfall of automatically equating a poor score with the absence of testamentary capacity. A testator who scores poorly in these tests may well fully satisfy the Banks v Goodfellow criteria.

4.5. Suspicion of undue influence

Undue influence is defined as engaging in manipulation or deception to significantly impair the ability of a testator to freely decide on the distribution of his property.[14] Where a court finds that a testator was the subject of undue influence the will may be declared invalid. Undue influence is a legal concept and it is the role of the court, rather than the medical practitioner, to declare with certainty that a testator was the subject of undue influence. However, one of the key roles of the medical practitioner in assessing testamentary capacity is to identify individuals who are vulnerable to undue influence.[15] This vulnerability might arise from physical or psychological dependence on caregivers or from the mental strain of coping with terminal illness.

Where the distribution of assets in the will differs from that which would be the most logically accepted outcome, then the medical practitioner should ensure that the testator fully appreciates the significance and effect of his actions. The prudent medical practitioner would be advised to document the explanation that the testator gives for his decision, particularly where that decision deviates from what might be expected by family members. The rationale behind the decision making process should be discussed with the testator so as to ensure that it is not the result of delusion or other thought disorder.

Where there is discord between the testator and his family, or between family members other than the testator, the practitioner should ask the testator to outline his feelings on the subject. The practitioner should document evidence of the testator's ability to understand the conflict and the implications that it has had on his will. A record of the testator's opinion on complex family relationships and dynamics can be of assistance to the court in understanding the rationale behind the will and its validity.

4.6. Retrospective assessment

The medical practitioner may be asked to provide an opinion on testamentary capacity after the testator has died. In addition to review of medical and psychiatric notes, collateral history from other health care professionals who were involved with the testator whilst he was alive and from the testator's family, friends and neighbours may be helpful. Although retrospective assessment is challenging, it is frequently possible to produce an informed opinion on capacity if all these potential sources of information are investigated.

4.7. Other potential pitfalls

Medical practitioners should exercise caution in acting as witnesses to wills. For a medical practitioner to do so, implies to the

Table 3
Common causes of dementia (adapted from Ref. 10).

Dementia in Alzheimer's disease: A primary degenerative cerebral disease of unknown aetiology with characteristic neuropathological and neurochemical features. The disorder is usually insidious in onset and develops slowly but steadily over a period of several years. May be classified as early onset (<65 years) or late onset (>65 years).
Vascular dementia: The result of infarction of the brain due to vascular disease, including hypertensive cerebrovascular disease. The individual infarcts are usually small but are cumulative in their effect. Vascular dementia may be acute in onset after a single large stroke or a rapid succession of strokes. More commonly, it is gradual in onset following a number of transient ischaemic episodes which produce an accumulation of intact in the brain. In the later case memory and functional impairment may develop in a stepwise fashion.
Other causes of dementia: Mixed vascular and Alzheimer's dementia, Frontotemporal dementia, Parkinson's disease, Pick's disease, Creutzfeldt-Jakob disease, Huntington's disease, the Human Immunodeficiency Virus (HIV), neurosyphilis, vitamin B12 deficiency, etc

court that the practitioner has carried out a formal assessment of testamentary capacity. In signing the will as a witness the medical practitioner is in effect affirming the capacity of the testator to produce a valid will. The medical practitioner should never be involved in the assessment of testamentary capacity in the case of a will where he/she is to be a beneficiary. Finally, the medical practitioner should be very careful not to disclose details of an individual's will to any third party without the expressed consent of the testator.

5. The medico-legal report

The person who requested the assessment should be identified. The body of the report should outline the history and mental state examination findings along with the scores from any standardised tests of cognitive function that were employed. The Banks v Goodfellow criteria should be discussed with reference to the testator. Documentation of the testator's own words, in response to the questions that are put to him, represents good professional practice and adds to the validity of the report. The medical practitioner should indicate whether or not the testator's capacity is influenced by any medical or psychiatric diagnosis. Where undue influence is suspected, the practitioner should outline items of physical or mental health, personality or social circumstances that increase vulnerability to such influence. Finally, the medical practitioner should provide a diagnostic impression.

6. Conclusion

An appropriately qualified and experienced medical practitioner may provide an opinion on a person's capacity to make a valid will, however testamentary capacity is a legal concept and the ultimate decision is made by the court. A suggested approach to the medical assessment of testamentary capacity has been provided along with an outline of potential pitfalls. Medical practitioners are urged consider testamentary capacity within the context of each testator's unique set of physical, psychiatric and social circumstances.

Conflict of interest

None declared.

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